

**SECOND AMENDMENT TO AGREEMENT BETWEEN CITY OF SUNNYVALE AND
SUNNYVALE SCHOOL DISTRICT PERTAINING TO THE USE, MAINTENANCE
AND IMPROVEMENT FOR PUBLIC RECREATIONAL PURPOSES OF VARIOUS
BUILDINGS AND OPEN SPACE AREAS AT THE BISHOP, CHERRY CHASE,
COLUMBIA, CUMBERLAND, DE ANZA, ELLIS, FAIRWOOD, HOLLENBECK,
LAKEWOOD, SAN MIGUEL, SUNNYVALE MIDDLE AND VARGAS SCHOOL SITES;
AND PERTAINING TO POSSIBLE ACQUISITION BY CITY OF SUNNYVALE OF
LIMITED AREAS OF SCHOOL SITES OWNED BY SUNNYVALE SCHOOL
DISTRICT**

**(AMENDMENT FOR CITY ACCESS AND FENCE/GATE IMPROVEMENT NEAR
VARGAS SCHOOL SITE)**

THIS AGREEMENT is made this ____ day of _____, 2006, by and between the Sunnyvale School District, a California public school district located in the County of Santa Clara, California ("District") and the City of Sunnyvale ("City"), a municipal corporation (together, the "Parties").

RECITALS

WHEREAS, in June 1991 the parties superseded prior agreements related to usage and maintenance of open space areas with an agreement between the parties ("The Comprehensive 1991 Open Space Agreement") pertaining to the use, maintenance and improvement for public recreational purposes of various buildings and open space areas at twelve (12) school sites of District within the territorial limits of City, including the Vargas School Site; and

WHEREAS, in June 1994 the parties adopted a first amendment to The Comprehensive 1991 Open Space Agreement to enable the District to install a running track over a portion of the open space of the Columbia School/Park site in conjunction with the conversion of the school from an elementary school to a middle school; and

WHEREAS, District continues to own certain real property commonly known as Vargas Elementary School located at 1054 Carson Drive, Sunnyvale, located in the County of Santa Clara, California ("Vargas School Site"); and

WHEREAS, the District acknowledges the existence of a City fence in a landscaped area of approximately 45 feet by 425 feet or 19000 square feet on District property along the eastern boundary of the Vargas School Site and adjacent to the City's Carson Water Plant; and

WHEREAS, the parties are desirous of amending The Comprehensive 1991 Open Space Agreement to provide for the City's non-exclusive access over and adjacent to the eastern portion of the Vargas School Site, as more fully described in Exhibits "A" and "B" attached hereto and incorporated herein, for the following purposes: City security purposes and emergency access related to the Carson Water Plant; installation of a locking 16-foot wide chain link drive gate for passage of vehicles in the south end of the existing fence for temporary access

when primary access from Mary Avenue is closed for maintenance purposes; and ongoing maintenance; and

WHEREAS, the City's non-exclusive access, as more fully described in Exhibits "A" and "B", and this Second Amendment to The Comprehensive 1991 Open Space Agreement, shall be subject to the additional terms and conditions described herein; and

WHEREAS, all other provisions of The Comprehensive 1991 Open Space Agreement as previously amended ("Agreement") shall remain in full force and effect;

NOW THEREFORE, in consideration of the covenants and agreements hereinafter set forth, District and City agree as follows:

Section 1. Scope of Access. District hereby agrees to allow City non-exclusive access ("Access") over a portion of the District's property along the eastern boundary of the Vargas School Site and adjacent to the Carson Water Plant, as more specifically described in Exhibits "A" and "B" attached and incorporated herein ("Access Area"). The City's Access shall be restricted by the following conditions:

- A. City shall use the Access solely for security purposes and emergency access related to the Carson Water Plant.
- B. City shall have full responsibility for the condition and maintenance of the Access Area.
- C. City shall notify the District at least thirty (30) days prior to any non-emergency access of the water site through District property.

Section 2. Improvement of Access Area. At its sole cost and expense, City may improve portions of the Access Area by performing all or some of the following only ("Improvements"), only with District's prior approval of size, design, and installation/construction schedule: Demolishing some portion of the existing fence, and performing all design, site work, and construction for installation of a locking 16-foot wide chain link drive gate for passage of vehicles in the south end of the existing fence for temporary access when primary access from Mary Avenue is closed for maintenance purposes.

Section 3. Permits and Approvals. City shall be solely responsible for obtaining all necessary state and local permits and approvals prior to constructing and installing the Improvements on the Access Area, including, without limitation, all permits and approvals required by the County of Santa Clara, and the State of California and their subdivisions including, if applicable, the Division of the State Architect ("DSA"). City shall provide copies of the permits and approvals to District prior to constructing and installing the Improvements on the Access Area. The District shall cooperate with the City and take all reasonable actions necessary to assist the City in obtaining all permits and approvals.

Section 4. Cost of Improvements. City shall be solely responsible for the total cost of Improvements to the Access Area, which shall include, without limitation:

- A. All costs attributable to the purchase and installation of the Improvements, including the actual cost incurred by City for all labor and materials required for the purchase and installation of the Improvements;
- B. All costs related to procuring permits, inspections, and/or environmental clearance;
- C. Maintenance of the Improvements; and
- D. City's costs for overhead, staffing, and/or all other indirect expenses incurred pursuant to this Second Amendment to the Agreement.

Section 5. Compliance with Applicable Laws.

- A. In performing any work under this Second Amendment to the Agreement and in the use of the Access Area, City shall conform to the following specific rules and regulations as well as all other applicable laws, ordinances, rules and regulations:
 - (1) Labor Code of the State of California - Division 2, Part 7, Public Works and Public Agencies.
 - (2) Education Code of the State of California
 - (3) Government Code of the State of California
 - (4) Public Contract Code of the State of California
 - (5) Uniform Building Code, latest addition, and the California Code of Regulations, Title 24 including amendments.
 - (6) Manual of Accident Prevention in Construction, latest edition, published by A.G.C. of America.
 - (7) Industrial Accident Commission's Safety Orders, State of California.
 - (8) Regulations of the State Fire Marshall (Title 19, California Code of Regulation) and Pertinent Local Fire Safety Codes.
- B. City shall at City's expense comply with all requirements of all governmental authorities, in force either now or in the future, affecting the Access Area.
- C. The judgment of a court of competent jurisdiction, or City's admission in an action or a proceeding against City, whether the District be a party to it or not, that City has violated any law or regulation or ordinance in City's use of the Access Area shall be considered conclusive evidence of that fact as between the District and City. If City fails to comply with any such law, regulation or ordinance, the District reserves the right to take necessary remedial measures at City's expense, for which City agrees to reimburse the District on demand.
- D. City shall not cause or permit any Hazardous Material to be generated, brought onto, used, stored, or disposed of in or about the Access Area and any improvements by City or its agents, employees, contractors, subcontractors, or invitees. City shall comply with all Environmental Laws. As used herein, the term "Hazardous Materials" means any hazardous or toxic substance, material or

waste which is or becomes regulated by any local governmental authority, the State of California or the United States Government. The term "Hazardous Materials" includes, without limitation, petroleum products, asbestos, PCB's, and any material or substance which is (i) defined as hazardous or extremely hazardous pursuant to Title 22 of the California Code of Regulations, Division 4.5, Chapter 11, Article 4, section 66261.30 et seq. (ii) defined as a "hazardous waste" pursuant to section (14) of the federal Resource Conservation and Recovery Act, 42 U.S.C. 6901 et. seq. (42 U.S.C. 6903), or (iii) defined as a "hazardous substance" pursuant to section 10 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 et. seq. (42 U.S.C. 9601). As used herein, the term "Hazardous Materials Law" shall mean any statute, law, ordinance, or regulation of any governmental body or agency (including the U.S. Environmental Protection Agency, the California Regional Water Quality Control Board, and the California Department of Health Services) which regulates the use, storage, release or disposal of any Hazardous Material.

Section 6. Title to Property. The Parties acknowledge that fee simple title to the Access Area is held by the District.

Section 7. Term. The term of this Second Amendment to the Agreement shall commence on _____, 2006, and shall remain in effect until it is terminated or upon the City's removal of its water system components.

Section 8. Termination. District may terminate this Second Amendment to the Agreement immediately, upon written notice, upon a breach by the City of this Second Amendment to the Agreement or upon any violation by City of any law, rule, regulation or ordinance, including District rules and regulations. Termination of this Second Amendment to the Agreement shall also immediately terminate the Access granted by it.

Section 9. Hold Harmless/Indemnification. To the furthest extent permitted by California law, City shall defend, indemnify, and hold harmless the District, its agents, representatives, officers, consultants, employees, trustees, and volunteers ("indemnified parties") from any and all demands, losses, liabilities, claims, suits, and actions ("claims") of any kind, nature, and description, including, but not limited to, attorneys' fees and costs, directly or indirectly arising out of, connected with, or resulting from the performance of the Second Amendment to the Agreement, City's use of the Access Area, City's compliance or non-compliance with any applicable codes and/or regulations, or from any activity, work, or thing done, permitted, or suffered by City in conjunction with the performance of the Second Amendment to the Agreement, unless the claims are caused wholly by the sole negligence or willful misconduct of the indemnified parties. This indemnification shall survive the expiration or termination of the Second Amendment to the Agreement. The District shall have the right to be advised on and approve the legal counsel selected by the City to defend the District, and such approval shall not be unreasonably withheld.

Section 10. Notice. Any notice required or permitted to be given under this Second Amendment to the Agreement shall be deemed to have been given, served and received if given in writing and personally delivered or either deposited in the United States mail, registered or certified mail, postage prepaid, return receipt required, or sent by overnight delivery service or facsimile transmission, addressed as follows:

DISTRICT

Sunnyvale Elementary School District
819 West Iowa Ave
P.O. Box 3217
Sunnyvale, CA 94088-3217

CITY

City of Sunnyvale

Any notice personally given or sent by facsimile transmission shall be effective upon receipt. Any notice sent by overnight delivery service shall be effective the business day next following delivery thereof to the overnight delivery service. Any notice given by mail shall be effective three (3) days after deposit in the United States mail.

Section 11. Assignment. Neither party shall assign its rights, duties or privileges under this Second Amendment to the Agreement, nor shall either party attempt to confer any of its rights, duties or privileges under this Second Amendment to the Agreement on any third party.

Section 12. Independent Status. This Second Amendment to the Agreement is by and between two independent entities and is not intended to and shall not be construed to create the relationship of agent, servant, employee, partnership, joint venture, or association.

Section 13. California Law. This Second Amendment to the Agreement shall be governed by and the rights, duties and obligations of the Parties shall be determined and enforced in accordance with the laws of the State of California. The Parties further agree that any action or proceeding brought to enforce the terms and conditions of this Second Amendment to the Agreement shall be maintained in the County in which the District's administrative offices are located.

Section 14. Attorneys' Fees. Each party shall bear its own costs, expenses and attorneys' fees associated with any action taken to enforce the terms and conditions of this Second Amendment to the Agreement.

Section 15. Waiver. The waiver by either party of any breach of any term, covenant, or condition herein contained shall not be deemed to be a waiver of such term, covenant, condition, or any subsequent breach of the same or any other term, covenant, or condition herein contained.

Section 16. Successors and Assigns. This Second Amendment to the Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective heirs, legal representatives, successors, and assigns.

Section 17. Counterparts. This Second Amendment to the Agreement and all amendments and supplements to it may be executed in counterparts, and all counterparts together shall be construed as one document.

Section 18. Captions. The captions contained in this Second Amendment to the Agreement are for convenience only and shall not in any way affect the meaning or interpretation hereof nor serve as evidence of the interpretation hereof, or of the intention of the Parties hereto.

Section 19. Severability. Should any provision of this Second Amendment to the Agreement be determined to be invalid, illegal or unenforceable in any respect, such provision shall be severed and the remaining provisions shall continue as valid, legal and enforceable.

Section 20. Incorporation of Recitals and Exhibits. The Recitals and each exhibit attached hereto are incorporated herein by reference.

All other provisions of The Comprehensive 1991 Open Space Agreement as previously amended shall remain in full force and effect.

IN WITNESS WHEREOF, the Parties have executed this Second Amendment to the Agreement on the dates indicated below:

ACCEPTED AND AGREED on the date indicated below:

Dated: _____, 20__

Dated: _____, 20__

SUNNYVALE ELEMENTARY SCHOOL DISTRICT

CITY OF SUNNYVALE

By: _____

By: _____

Print Name: _____

Print Name: _____

Print Title: _____

Print Title: _____

Approved as to form:

Approved as to form:

Chad J. Graff
Miller Brown and Dannis

David Kahn
City Attorney